In Re the Arbitration between:

State of Minnesota, Department of Administration,

Employer,

and

AFSCME Council 5, AFL-CIO,

Union.

BMS No. 07-PA-0328

GRIEVANCE ARBITRATION OPINION AND AWARD

Grievance of Neil Metcalf.

Pursuant to the terms of their Collective Bargaining Agreement, the parties have submitted the above captioned matter to arbitration.

The parties selected James A. Lundberg as their neutral Arbitrator from a list of Arbitrators provided by the Minnesota Bureau of Mediation Services.

There are no procedural issues in dispute and the grievance is properly before the Arbitrator for a final and binding determination.

The grievant's employment was terminated on July 12, 2006.

The grievance at the third step was filed on July 14, 2006.

The hearing was conducted on January 23, 2007.

Briefs were posted on February 23, 2007.

APPEARANCES:

FOR THE EMPLOYER
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FOR THE UNION
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ISSUE:

Was there just cause to discharge the grievant effective July 12, 2006? If not, what is an appropriate remedy?

FACTUAL BACKGROUND:

The grievant, Neil Metcalf, was employed by the Minnesota Department of Administration for a period of twenty seven (27) years. Except for a two (2) year period between May 1996 and June of 1998, when he worked as a supervisor, Mr. Metcalf was employed as a General Maintenance Worker. According to performance reviews submitted into evidence, Mr. Metcalf was considered an excellent employee.

On Friday June 30, 2006 a news crew from Channel 9 approached Mr. Metcalf in the parking lot at the History Center, where he worked. The Channel 9 news crew appeared at approximately 3:20 PM, 40 minutes before the end of Mr. Metcalf's shift ended. He was asked by the news crew where he was going, if he was drinking beer and smoking pot and what was in his cooler. At the time that the Channel 9 news crew approached him, Mr. Metcalf was on his way to the Credit Union to conduct personal business.

Mr. Metcalf approached his supervisor on Monday July 3, 2006. He told his supervisor, Mr. Davis, about the incident with the Channel 9 news crew and wanted to know whether he could use vacation retroactively for June 30, 2006.

Mr. Davis contacted his supervisor, Mr. Will about Mr. Metcalf's report. The Acting Plant Management Division Director and Labor Relations Director were contacted about the situation. Mr. Will, the second line supervisor, and Mr. Davis were directed to conduct an investigation into Mr. Metcalf's conduct. Mr. Metcalf was interviewed. He

informed the investigators that for some period of time prior to the arrival of the Channel 9 news crew at his work station he had engaged in the following misconduct:

- He had left his work station to conduct personal business.
- He had consumed alcohol and pot during the work day and at work.

In his testimony Mr. Metcalf said that he would often leave work for a couple of beers.

Mr. Metcalf was discharge effective July 12, 2006. The discharge was grieved at the third step in accordance with the terms of the collective bargaining agreement on July 14, 2006.

Following his discharge, Mr. Metcalf sought treatment for alcoholism. He participated in treatment for alcoholism through Region's Hospital and became a regular participant in AA. His counselor from the Region's program testified at hearing that he is convinced that Mr. Metcalf is committed to maintaining his sobriety now and in the future and a witness from AA verified grievant's participation in AA and grievant's commitment to sobriety.

SUMMARY OF EMPLOYER'S POSITION:

The Plant Management Work Rules and Policies clearly establish an employees' work schedule, lunch period and the accepted periods when an employee may leave the work site, while on the clock. Mr. Metcalf admitted that he often left work without notifying his supervisor. During the investigation he said that he left the work site an average of five times per week without authorization, while he was being paid to work. It is a major violation of Plant Management Work Rules and a violation of the Hours of

Work Provision of the Collective Bargaining Agreement for an Employee to claim wages for hours he did not work.

Grievant knew or should have known that he was expected to be at work when he was being paid to be at work.

Grievant did not obtain authorization to be away from work on three separate occasions on June 30, 2006. Between 10:00 AM and 11:00 AM he went home to check on the progress of a construction project. He checked on the construction project a second time between 1:00 PM and 2:00 PM of the same day. Finally, he was leaving work to go to the Credit Union at about 3:20 PM, when the television news crew approached him. The grievant exceeded his authorized break times on June 30, 2006 by at least one (1) hour and ten (10) minutes. He accepted a full days pay for the day.

Grievant's unauthorized time away from work on June 30, 2006 was not related to his alcoholism. Grievant told investigators that on June 30, 2006 he did not consume alcohol during the work day. He pointed out that in a conversation with a supervisor on June 30, 2006 the supervisor did not detect any odor of alcohol on his breath. The Employer does not dispute the grievant's claim. However, the Employer contends that grievant's misconduct on June 30, 2006 was unrelated to his alcoholism.

Grievant also admitted that he consumed alcohol and illegal drugs during the work day and at the work site. The consumption of alcohol and/or illegal drugs during work hours, while on the State's premises, during rest breaks and on paid overtime is prohibited. The grievant admitted that he regularly violated the State's Drug & Alcohol Policy, which prohibits such activities.

The discharge of grievant for his abuse of the State's Drug and & Alcohol Policy as well as his unauthorized time away from work and claiming pay for time he did not work is appropriate. Either form of misconduct is sufficient to establish just cause for discharge. Using alcohol or illegal drugs while on duty is a major rule violation for which discharge is appropriate. Similarly, claiming pay for hours not worked is misconduct for which discharge is the appropriate remedy. The grievant engaged in two major forms of misconduct over a long period of time. His misconduct was so egregious that discharge is the only appropriate form of discipline available.

The grievant's misconduct is not comparable to the two situations cited by the Union as evidence of disparate treatment. One other employee was demoted to a position that did not require a valid commercial driver's license, after receiving an off duty DUI. The demotion was related to that employee's loss of a qualification to working as a Senior Groundskeeper. The employee's misuse of alcohol that led to the loss of a valid commercial drivers license occurred "off duty." The second situation involved an employee who reported to work under the influence of alcohol. The employee received a five day suspension. The employee who received the five day suspension did none of the following:

- Leave the worksite without authorization to conduct personal business and/or violate the Drug and Alcohol Policy, while claiming pay for time on the clock.
- Use alcohol and/or illegal drugs while on work time and on State property.
- Regularly violate the Drug and Alcohol Policy.

The Employer acknowledged that grievant had a positive work record but did not consider the work record to be relevant in this situation. The discharge was not based upon performance issues. The grievant was discharged for egregious misconduct.

The Employer appreciates the fact that the grievant received post discharge treatment for alcoholism. However, grievant took action to address his alcoholism after he was discharged. Grievant was discharged before he took any steps to address his problem with alcoholism.

In a **BMS case No. 02-PA-1156** Arbitrator Charlotte Neigh articulated the following principle:

> The Grievant's long-term employment and good record notwithstanding, the Employer reasonably applied a carefully considered and rational set of factors to his conduct, which logically led to a determination that his violation of the Policy warranted termination of his employment." (p.8)

The Employer urges the Arbitrator to follow the principle used by Arbitrator Neigh and uphold the discharge.

SUMMARY OF UNION'S POSITION:

Mr. Metcalf was an exceptional State employee. He never received a poor performance review over his twenty seven (27) year tenure. In fact, his most recent performance review, made approximately two (2) months prior to his discharge was his best performance review.

During his twenty seven (27) years as a State employee, Mr. Metcalf received no discipline of any significance. Mr. Metcalf realized, when confronted by a television work crew at his job site that he had a serious problem. In order to avoid or at least

minimize the embarrassment to his Employer caused by his addictive behavior, Mr. Metcalf went to his supervisors and told them what had happened. Mr. Metcalf reported his misconduct honestly and accurately. He was the Employer's only source of information regarding his misconduct and there is no evidence that Mr. Metcalf's misconduct would ever have been discovered, except for the fact that Mr. Metcalf told his supervisors what he had been doing.

Mr. Metcalf's forthright disclosure to his supervisors that an unpleasant and embarrassing news highlight might be aired resulted in his discharge. The news story never aired. The Employer was never embarrassed by grievant's misconduct. Had Mr. Metcalf remained silent and not disclosed his misconduct which was clearly driven by his alcoholism, it is quite possible that Mr. Metcalf would still be working for the State, receiving excellent performance reviews and violating major work rules on a regular basis. The Employer should have given significant weight to the fact that grievant self reported and was the exclusive source of information concerning his misconduct.

Mr. Metcalf took appropriate steps to address the cause of his misconduct by entering into treatment and participating in AA. His progress is good and it is unlikely that his prior misconduct will be repeated. Mr. Metcalf acknowledged his misconduct and took corrective action to address the addictive behavior that was driving his inappropriate behavior.

At the time that Mr. Metcalf was discharged he had no history of disciplinary problems. In fact, Mr. Metcalf's job performance reviews were positive. His most favorable performance review in a twenty seven (27) year career of positive performance reviews was received two (2) months before his discharge. The Employer failed to give

adequate weight to Mr. Metcalf's unblemished work history and his twenty seven (27) years of excellent service.

The Employer has treated similar employee misconduct differently in the past. One employee was given only a five day suspension for coming to work under the influence of alcohol. Another employee who was disqualified from working as Senior Grounds Keeper due to receipt of a DUI and the consequential loss of a commercial driver's license was demoted to a position that did not require a commercial driver's license. There is no evidence that the Employer considered any other form of discipline in Mr. Metcalf's case.

Some form of discipline short of discharge could have been imposed upon Mr. Metcalf. He had a long history of positive job evaluations, he had no history of disciplinary problems and he addressed the underlying problem of alcoholism by entering treatment and participating in after treatment care. Mr. Metcalf's performance before his discharge was excellent. The Employer would not have known of his rule violations, but for that fact that grievant reported on himself. The evidence suggests that grievant was meeting the expectations of his supervisor right up to the moment he was summarily discharged for informing on himself.

The Employer should have given great weight to the following mitigating factors and imposed some form of discipline short of discharge:

1. Mr. Metcalf self reported his misconduct.
2. During the investigation Mr. Metcalf honestly reported the nature and extent of his misconduct.

3. Mr. Metcalf's job performance was consistently considered excellent by his supervisors.
4. Mr. Metcalf was a twenty seven (27) year employee with no history of misconduct.

Taking all of the mitigation factors into consideration the discharge of Mr. Metcalf was too harsh a penalty.

OPINION:

Plant Management Work Rules clearly prohibit the kind of misconduct engaged in by Mr. Metcalf. It is clear that State employees are expected to be on the job, not running personal errands, when they claim wages from their Employer. It is also clear that the State prohibits the use of alcohol and drugs while on the job. The question is not whether Mr. Metcalf should be disciplined but whether discharge was too harsh a penalty given his otherwise positive work record.

There is no doubt that Mr. Metcalf performed his job at a high level, far above what would be considered "acceptable", for twenty seven (27) years. There is evidence in the form of a letter from the History Center Facilities Manager that Mr. Metcalf's work was exemplary and his return to work would benefit the Employer. In fact, there is substantial evidence that imposition of some penalty short of discharge would be appropriate in this case.

The fact that Mr. Metcalf self reported his misconduct is evidence of his general propensity to be honest and a desire to do the right thing. It is likely that Mr. Metcalf self reported only because he believed that he was going to be featured on the news. However, fear of a negative news story does not explain the extensive and detailed

disclosures the grievant gave to the supervisors who investigated his misconduct. The grievant could easily have given his supervisors much less information about his misconduct during the investigative interview.

The Employer gave very little, if any, consideration to Mr. Metcalf's exemplary work history. He served the State for twenty seven (27) years without any disciplinary problems. More importantly, grievant's work history reflects an employee who is committed to performing his job at a level far above the average.

Finally, Mr. Metcalf's willingness to enter treatment, participate in treatment and follow up by active participation in AA is strong evidence of his desire to address the core problem that appears to have been driving his misconduct. There is good reason to view an employee's attempt to get off the hook by going to treatment with skepticism. However, Mr. Metcalf's entry into treatment and his participation in after care appears to have genuinely addressed the problem that led to his misconduct. Consequently, it appears that Mr. Metcalf would be unlikely to engage in the kind of egregious misconduct that led to his discharge, if he is returned to work.

The Arbitrator agrees with the Union that some form of discipline short of discharge is appropriate in this case. However, the discipline must be harsh given the nature of Mr. Metcalf's misconduct and Mr. Metcalf's return to work must include a condition that that is intended to give the Employer confidence that the misconduct will not reoccur. The condition must be met without additional effort by the Employer.

The grievant should be returned to work but without back pay. Grievant has already received payment from the State for hours not worked. An award of back pay in this instance would be inappropriate.

Grievant's return to work should be conditioned upon his regularly reporting his attendance at AA meetings. Mr. Metcalf should be required to attend AA meetings at least every two weeks for a period of one year to give the employer confidence that he is indeed continuing his recovery efforts.

AWARD:

1. ***The grievance is upheld.***
2. ***Mr. Metcalf shall be returned to work as of March 20, 2007, without back pay. His absence from work shall be deemed a disciplinary suspension without pay.***
3. ***Mr. Metcalf shall provide to his direct supervisor written evidence that he has attended an AA meeting at least every other weeks for a period of one year beginning March 20, 2007 and ending March 19, 2008.***

Dated: March 13, 2007

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James A. Lundberg, Arbitrator